

EXHIBIT 11

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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

3 ARISTA RECORDS, et al.,

4 Plaintiffs,

5 v.

06 CV 5936 (GEL)

6 LIME WIRE LLC, et al.,

7 Defendants.

8 -----X

New York, N.Y.
December 7, 2007
5:00 p.m.

10 Before:

11 HON. GERARD E. LYNCH,

District Judge

13 APPEARANCES

14 CRAVATH, SWAINE & MOORE
15 Attorneys for Plaintiffs

15 BY: KATHERINE B. FORREST
16 TEENA-ANN V. SANKOORIKAL
16 JOANNE M. GENTILE

17 PORTER & HEDGES
18 Attorneys for Defendants

19 BY: CHARLES S. BAKER
19 JOSEPH D. COHEN

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1 (In open court)

2 THE DEPUTY CLERK: Arista Records v. Limewire LLC.
3 MS. FORREST: Katherine Forrest with Cravath, Swaine &
4 Moore for plaintiffs.

5 MS. SANKOORIKAL: Teena-Ann Sankoorikal from Cravath
6 for plaintiffs.

7 MS. GENTILE: Joanne Gentile for plaintiffs.

8 MR. BAKER: Your Honor, Charles Baker on behalf of the
9 defendants.

10 THE COURT: Good afternoon, Mr. Baker.

11 MR. COHEN: Joe Cohen from Porter & Hedges in Houston,
12 also for the defendants.

13 THE COURT: Mr. Cohen, good afternoon. It probably
14 wasn't the wisest thing to schedule this so late in the day

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15 that had four sentencings in the afternoon. But that's where
16 we are.

17 Fortunately, the parties have submitted a very
18 thorough joint letter that set forth the various issues that
19 divide them on discovery, and I've carefully reviewed that and
20 so I'm able to rule on most of these issues.

21 Now, since that letter was written, the circumstances
22 have changed in that I've dismissed the antitrust counterclaims
23 that underlay some of these discovery issues. Though as I
24 trace through it, that may make less difference than I might
25 have thought. Partly because the defendants have other

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1 arguments as to why they need the discovery that they seek, and
2 partly because some of what they seek I wouldn't have granted
3 even if the antitrust counterclaims were there.

4 So I am going to try and just go through these and
5 make rulings, and I've asked the court reporter to stay around
6 so that everyone wouldn't have to be quite so frantically
7 taking notes, and we'll have a record of what I actually
8 ordered.

9 First, there is an issue with respect to the proof of
10 copyright ownership and what discovery needs to be provided on
11 that front. It seems to me that the sensible resolution here
12 is the plaintiffs' alternative suggestion, that we simply take
13 some subset of copyrighted works and sever the claims as to
14 those for the initial purpose of deciding whether there is
15 liability or not.

16 There is not likely to be a serious dispute about
17 whether the plaintiffs own the copyrights to at least some of
18 the material that is at issue here. That's not what this case
19 is about. But of course, if we ever get there and there is a
20 damages assessment, the extent of whatever the alleged
21 infringement might be, might be relevant to that, and it might
22 be necessary to figure out what of the material here really is
23 copyrighted.

24 But, it's not necessary to have more than a single
25 item, as far as I'm concerned, in order to address the basic

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1 liability issues that are what the case is about. And since
2 you never do anything with a single item because you need at
3 least a belt and suspenders and probably a rope and a couple of
4 other things to avoid errors and things becoming moot and
5 unforeseen events, a relatively small subset of copyrighted
6 items will suffice.

7 And if the plaintiffs provide the discovery as to
8 those, we can worry about the others if, as and when we get to
9 damages phase, or if, as and when it becomes necessary or
10 appropriate to address the rest of the copyrighted materials.

11 Second, there is an issue as to whether EMI and UMG,
12 two of the plaintiffs, are required to search for documents
13 prior to February 2006. Notwithstanding that they take the
14 position that all documents relevant to the case that existed
15 prior to February 2006 were produced in prior antitrust
16 government investigations and lawsuits, and therefore, have
17 been produced to the defendants in this case.

18 Now, I note two things about this. Number one, the
19 antitrust claims have been dismissed. And while it is true
20 that the plaintiffs maintain that the antitrust counterclaims
21 are simply some species of copyright abuse and therefore

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22 necessary for the defense of the plaintiffs' claims, the
 23 contingency of whether there really is an abusive copyright
 24 defense in this circuit and what exactly it would consist of
 25 and the fact that at any rate it is not congruent completely

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1 with the alleged antitrust violations, and the fact that the
 2 principal antitrust violation that can be at issue here has to
 3 do with the refusal to provide hashes, which seems to have
 4 occurred in 2006 and not before it, suggests that so long as
 5 the parties are looking for documents post-February 2006, and
 6 given that they've produced, as I understand it, the materials
 7 that had been produced in prior antitrust matters, the only
 8 thing that I will order here is that the plaintiffs provide the
 9 defendants with information regarding what the specific
 10 document requests were that led to these productions in the
 11 prior matters which may enable the defendants to focus on what,
 12 if anything, they specifically need for the defenses that are
 13 still in the case that might not be covered by the prior
 14 productions. And if there is such a thing, then they can seek
 15 it. And if there is still an issue, that can come before the
 16 Court at some future point.

17 Given the status of the case, it is hard for me to
 18 believe that greater discovery on that front will be ordered.

19 Next there is a question of whether the record labels
 20 themselves, the so-called subsidiaries, shall be required to
 21 produce responsive documents for certain requests with respect
 22 to communications about Limewire. And it seems to me that
 23 since those are the actual defendants, and they may have
 24 material that is relevant to the copyright misuse defense, that
 25 they should have to produce, and not simply inherent companies.

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1 Next there is a issue with respect to custodial lists,
 2 organizational charts. I think the only issue here as far as I
 3 can figure out that is of any interest is whether the custodial
 4 lists are sufficient. It seem to me the plaintiffs are correct
 5 that those lists include the persons most likely to possess
 6 documents related to the claims or defenses of the parties.
 7 And I am not going to direct that any further discovery be
 8 provided as to the process by which the plaintiffs selected
 9 these custodians.

10 In the joint letter I couldn't find anything that gave
 11 me any reason to think that the plaintiffs had not identified
 12 the right people, and as those people are -- any of those
 13 people are deposed or as further discovery proceeds, if the
 14 defendants have some actual reason to think there is some
 15 deficiency, maybe that could be raised at some future point.
 16 But I don't think there is a need, given the volume of
 17 discovery that has been made and its limited relevance to the
 18 core issues in the case, that we need to have some further
 19 inquiry into the process by which the discovery was made.

20 Next, there is an issue of communications related to
 21 digital distribution licensing agreements. And it seems to me
 22 that the plaintiffs' representation that they've agreed to
 23 provide the licensing agreements related to digital downloading
 24 and the negotiation files associated with those agreements is
 25 adequate to deal with that issue.

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22 propose to explore in depositions related to the copyright
 23 misuse defense, and what basis in the documentary record there
 24 is for formulating some concrete, this is what we think the
 25 plaintiffs did, this is what evidence we've already got that

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1 suggests they did it, here is why as a matter of law that is a
 2 defense, and here is who we're going to have to talk to, to
 3 develop this further.

4 MR. BAKER: If I may speak to that point. You may
 5 have wondered why I have this stack of documents here. This is
 6 the privilege logs that they have produced. They produced to
 7 us a month -- about six weeks ago. Just on the prior antitrust
 8 productions. I've got another box over here of a privilege log
 9 from the RIAA. They haven't given us the most recent
 10 production on the privilege log. This is going to take a long,
 11 long time to go through. They have claimed a lot of material
 12 as privileged.

13 THE COURT: That's because a lot of material is
 14 probably privileged. You can make -- you know, take your shot.
 15 Do what you need to do. But we are not going to be doing this
 16 forever. If there is some plausible objection you have to
 17 these assertions of privilege, we'll deal with that. But we're
 18 moving forward. I told you what I think this case is about.
 19 I've given you a lot of leeway. Don't push it. The leeway is
 20 you're getting these documents on claims that have been
 21 dismissed as counterclaims based on a pretty amorphous defense
 22 that may not even exist in this circuit. The idea is you are
 23 getting a lot of material. It may not be everything you want.
 24 If there is something they're withholding that they're
 25 improperly withholding, we can litigate that. But you've had

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1 your fun. You've had months of pursuing this stuff. By the
 2 end of January, if there is something that you've got, I expect
 3 to know what it is.

4 That's all I am saying. We are going to be moving
 5 forward into that process. We are going to be doing
 6 depositions. We are going to get to the end of this someday.
 7 And the heart of this story still is whether there is something
 8 about this peer-to-peer system that escapes from the
 9 plaintiffs' contention that it is a violation of copyright.

10 I don't know much, so I don't have any real opinion
 11 about that at this point. But it certainly doesn't seem to me
 12 to be a foregone conclusion that the way to defend this case
 13 has to be to somehow avoid a straightforward adjudication that
 14 you are doing something wrong. It seems to me there is -- my
 15 mind is completely open to the possibility you haven't done
 16 anything wrong at all. That is one piece of this. That's the
 17 big piece of this, in my view.

18 Because I am not that sympathetic, frankly, to the
 19 idea that -- if you were just stealing their intellectual
 20 property, I don't know what this copyright misuse thing is all
 21 about. It wouldn't have a lot of traction.

22 Anyway, enough said. I think I've ruled on the things
 23 I ruled on. If we are going to have something more, bring it
 24 on. Don't expect it is going to lead to a lot of delay, and
 25 don't expect we are going to be getting special masters, and

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1 don't expect we are going to just consume our lives with this.
 2 I am going to shoot from the hip. Do it from horseback. Try
 3 to get this case to someplace where it gets litigated. And
 4 that's what we are doing here.
 5 I don't feel obliged to review every document in these
 6 files and decide whether it's privileged. That's not a good
 7 use of my time. Given the nature of the case, I don't think it
 8 is a good use of any judicial officer's time. And I am going
 9 to take responsibility. I am going to do it at the level I
 10 think I can devote to it that's going to get the case moving.
 11 Anything else? Or can we all go home, especially the
 12 court reporter.
 13 MS. FORREST: I have one final issue, if I might, your
 14 Honor, to raise. Which is we had previewed in our letter
 15 brief, the joint letter brief of November 16, that we would be
 16 adding some additional tracks into our schedule A, which is at
 17 the back of the complaint. This does not change a single word
 18 of any substantive allegation in the complaint. As we said in
 19 paragraph 74 of our complaint originally, we would be spending
 20 some time during the discovery period trying to solidify what
 21 the list of tracks were that we were going to be suing upon.
 22 We have that ready. We understand from Limewire that
 23 they object to our putting that forward, so we raise it with
 24 the Court, though we didn't actually think this was something
 25 that needed to be raised to the level of any kind of judicial

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 1 intervention.

2 THE COURT: I wouldn't have thought so. Maybe I'm
 3 just not getting it, but isn't this related to this bifurcation
 4 or carving up business?
 5 MS. FORREST: It is, your Honor. It is going to add
 6 some sound recording registrations to the schedule at the back
 7 of complaint. So that now is going to be bifurcated, we'll
 8 give that list to Limewire now, but the issue should be sort of
 9 off the table, if you will.
 10 THE COURT: I would think so. I don't see any reason,
 11 particularly given that discovery hasn't progressed on this
 12 front and now isn't going to progress on this front, why there
 13 is any prejudice to amending the complaint to in effect add
 14 more allegedly copyrighted materials. That is because we have
 15 plenty of time if, as and when we get there to do that
 16 discovery and go through it all. But we are not going to add
 17 that at this point.
 18 MR. BAKER: After today's ruling, your Honor, that's
 19 fine with us. If they would just supply -- one of the reasons
 20 I've tried to ask why are you doing this, so we would have some
 21 justification to our client to allow this to happen.
 22 THE COURT: Okay. I think we're done for today.
 23 Thank you very much. Again, I'm sorry not to have had more
 24 time to discuss this with you all. But other people have other
 25 business, some of which involves their liberty. See you next

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 1 time I see you.

2 Tom will work out with you a date for some next
 3 conference just to be on the calendar in early April, but it
 4 may be that we'll be seeing more of each other between now and
 5 then anyway.
 6 Thank you. Happy holidays to everybody.

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